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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 617

VERNON J. BROWN, THEODORE I. FRY, et al., comprising MICHIGAN STATE BOARD OF TAX ADMINISTRATION,
Petitioners,
vs.
J. B. SIMPSON, INC., an Illinois corporation,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTIONAL STATEMENT

The petition for certiorari somewhat obscures the obvious lack of a federal question in this case by its failure scrupulously to observe the provisions of Rule 38, Section 2, and Rule 12, Section 1 of the Rules of this Court with reference to a jurisdictional statement.

Respondent's bill of complaint in the court of first instance (Circuit Court for the County of Wayne, Michigan, in Chancery), alleged that the Michigan Use Tax Act did not by its terms impose any duty or obligation upon respondent; but that, were it otherwise construed and applied, it would contravene the Constitution of the United States (R. 11, 12; ¶s VII, VIII). It prayed for a decree accordingly (R. 15, 16; ¶ (c)). The Trial Judge decreed (R. 58; ¶ 3):

> "The Court finds that the tax imposed by said Act is a valid and constitutional exercise of the taxing power of the State; * * * that said Act No. 94, Public Acts of 1937, does not impose any duty or tax upon this plaintiff (respondent)."

Petitioner appealed to the Michigan Supreme Court from this decree. Petitioner's assignment of error number 1 was as follows (R. 1):

> "The Court erred in holding that Act 94, Public Acts of 1937 does not impose any duty or tax upon J. B. Simpson, Inc."

Respondent cross-appealed, assigning as error the adjudication of the Trial Court that the Use Tax Act was constitutional and valid* (R. 2, 3).

Petitioner's brief in the Michigan Supreme Court stated the issues as follows:

> "This is one of four representative-group cases brought to this court on appeal to test the consti-

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*Section 5 of the Michigan Use Tax is the only section which obligates certain sellers of property to collect the use tax from the buyer. On petitioner's appeal, the single issue was whether J. B. Simpson, Inc., as a seller, came within the class defined by Section 5. One of the petitioner's contentions was that a general definition of terms in Section 2 of the Act took precedence over the limitation of the class of sellers found in Section 5.

tutionality of the Michigan use tax act, and in this particular cause to obtain a judicial construction of certain of its provisions (Act No. 94, Pub. Acts 1937 (Stat. Ann., Cum. Supp., 1939, § 7.555-1, *et seq.*))

"Questions involving the constitutionality of the act will be considered on plaintiff's cross-appeal.

"On appeal of the state board of tax administration, the question for decision is whether plaintiff is engaged in the business of selling tangible personal property at retail in Michigan, within the meaning of the use tax act (Assignment of Error No. 2), and whether the use tax act imposes any duty upon plaintiff (Assignment of Error No. 1)."

Respondent's brief in the Michigan Supreme Court stated the issues as follows:

"The Use Tax Act imposes duties and obligations only upon sellers 'of tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state' (Sec. 5). It has been finally adjudged by this Court that this appellee is not engaged in the business of selling at retail in this state. It therefore follows, as a matter of course, that the Use Tax Act imposes no duty or obligation upon this appellee. This result does not entail consideration of the effect of the commerce clause of the federal constitution."

The opinion of the Michigan Supreme Court held that the provisions of Section 5 of the Use Tax Act were inapplicable to respondent:

"A definition of words and phrases in an act carries no force unless employed in the enactment and cannot be considered in the present instance for the quoted enactment, by its specific terms, only applies to sellers of 'tangible personal property for

storage, use or other consumption in this State, engaged in the business of selling at retail in this State,' and this is manifested by the required registration of such persons under the act, unless registered under the sales tax act * * * (R. 67).

"We find no occasion to touch upon the constitutionality of the act and, as there was none necessary in the circuit court, the part of the decree below holding the act constitutional is eliminated and the question left without decision to await a proper setting" (R. 69).

A dissenting opinion was filed. This dissenting opinion did not pass upon the constitutionality of the Act but upon its construction, the Court saying (R. 72):

"Plaintiff (1) challenges the constitutionality of said act; and (2) claims that if the act is upheld, it does not apply to plaintiff's method of doing business in Michigan. The court below held that the tax imposed by the act is a valid and constitutional exercise of the taxing power of the State, but that it did not impose any duty or tax upon the plaintiff. Defendant State board of tax administration appeals from that part of the decree holding that the use tax act does not impose any duty or tax upon the plaintiff. Plaintiff cross-appeals from that part of the decree holding the act to be constitutional.

"This case is companion to *Banner Laundering Co. v. State Board of Tax Administration,* 297 Mich. 419, decided herewith, wherein the constitutionality of the use tax act is decided and upheld. It remains for us to consider whether the act applies to plaintiff's operations in this State."

NO SUBSTANTIAL FEDERAL QUESTION BEING INVOLVED, THIS COURT IS WITHOUT JURISDICTION

On the facts of this case, it is apparent that the decision of the Michigan Supreme Court rested wholly on a non-federal question, *viz.*, the interpretation to be placed upon Section 5 of the Act. None of the federal questions alleged by petitioner to be presented, are involved. What the Michigan Supreme Court held was that on the facts, respondent was not "engaged in the business of selling at retail in this state" within the meaning of Section 5 of the Michigan Use Tax Act. That is the point upon which issue was framed, and that is the point of decision. The Court itself left no room for doubt, because it specifically modified the Trial Court's decree by eliminating therefrom all decision on the question of constitutionality. Petitioner's position would be without merit if the only case decided by the Michigan Supreme Court on May 21, 1941 had been the case at bar. It is transparently lacking in merit when, on the same day, the Michigan Supreme Court rendered an opinion in companion cases holding the Michigan Use Tax Act constitutional. *Banner Laundering Co. v. State Board of Tax Administration* (appendix B to petition, p. 35).

ARGUMENT

A. As to Jurisdiction.

(1) In order that this Court may have jurisdiction, it must appear affirmatively not only that a federal question was presented for decision, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been rendered without deciding it. *Adams v. Russell,* 229 U. S. 353, 360-361. This Court in such case does not indulge in conjecture as to the result which would have been reached if the federal question had not been raised "and by conjecture acquire jurisdiction to review the judgment" of the state court. *Ibid* 358.

Authorities are reviewed in *Lynch v. New York Ex Rel. Pierson,* 293 U. S. 52, where, after stating the rule, the Court continues (54):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

(2) It may be, as in the cases relied upon by petitioner, *e. g., Indiana Ex Rel. Anderson v. Brand,* 303 U. S. 95 and *Southern Railway Co. v. Clift,* 260 U. S. 316, that if the State Court had rested its opinion solely upon federal grounds, the mere existence of an unconsidered non-federal question would not *ipso facto* defeat jurisdiction. But in the instant case such rule has no application, for the converse is the fact; the Court expressly refused to pass upon the federal question and rested its decision on the non-federal question.

The principle is stated as follows in *Eustis v. Bolles,* 150 U. S. 361, 366:

> "It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution*, or that the judgment as rendered could not have been given without deciding it (citing cases).
>
> "It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

To the same effect are *McQuade v. Trenton,* 172 U. S. 636; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U. S. 157 (where the Court further observed (164) that "where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-Federal questions (citing authority)"); *Brown v. Union Pacific Railroad Co.,* 267 U. S. 255; *Fox Film Corp. v. Muller,* 296 U. S. 207; and many other cases cited in those opinions.

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*The Act of 1925 now permits review as well where the federal claim is sustained as where it is denied, but this provision does not weaken the authoritative force of the case on the question here under consideration.

It is apparent that in the case at bar, if the federal question had been passed upon at all (which was not done), the case must be "controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller, supra,* 296 U. S. 207, 210.

There is no longer any doubt that the Michigan Use Tax Act is constitutional. That was settled on May 21, 1941, in the companion case of *Banner Laundering Co. et al. v. State Board of Tax Administration* (appendix B to petition, p. 35), from which no review has been sought. There is likewise no doubt that the state legislature, if it sees fit to do so, may amend Section 5 of the Michigan Use Tax Act by modifying the language upon which respondent relied and which formed the basis for the Michigan Supreme Court's opinion. If and when the statute is so amended, respondent or someone else may seek to raise a federal question concerning it, and in that event, it may become necessary to consider *Felt and Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62, and the other cases which petitioner cites. But until the statute has been amended and the question of constitutionality has been raised, this Court should not consider it. It is now a moot question. The decisions upon which petitioner relies deal with the constitutionality, not the interpretation of statutes.

B. Conclusiveness of the State Adjudication.

It is too well settled in this Court to admit of controversy that the adjudication by a State Court of last resort on the construction of its own statutes is conclusive. Without indulging in cumulative citations, we refer on this point to *Knop v. Monongahela etc. Co.*, 211 U. S. 485, and *Morehead v. New York Ex Rel. Tipaldo*, 298 U. S. 587.

In the *Knop Case*, the Court had under consideration a statute of Louisiana requiring the gauging of coal boats and barges before sale. The Supreme Court of Louisiana construed the statute to apply exclusively to sales of boat loads or barge loads, and not to apply to sales of a particular number of barrels from a boat or barge. Appellant sought review on the ground that this construction was erroneous; that the statute did apply to sales of barrels from a boat or barge; and that because it applied to broken load sales, it contravened the Federal Constitution. This Court dismissed the appeal for lack of jurisdiction.

In the *Morehead Case*, this Court said (609):

> "There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. *Supreme Lodge, K. P. v. Meyer*, 265 U. S. 30, 32, 68 L. Ed. 885, 887, 44 S. Ct. 432. Exclusive authority to enact carries with it final

> authority to say what the measure means. *Jones v. Prairie Oil & Gas Co.*, 273 U. S. 195, 200, 71 L. Ed. 602, 608, 47 S. Ct. 338."

What petitioner asks this Court to do is to repudiate the construction placed by the Michigan Supreme Court upon the Michigan Statute in the hope that a moot federal question then can be considered.

Petitioner appears to argue that the Michigan Supreme Court gave a wrong ground for its decision, and that it is therefore entitled to a writ of certiorari. But the Michigan Supreme Court did definitely decide that the statute, properly construed and interpreted, did not apply to the facts of the instant case, and that it was unnecessary to consider constitutional questions. The actual decision as to interpretation of the statute is conclusive, irrespective of the reasons given.

In *Helvering v. Gowran,* 302 U. S. 238, 245, this Court decided that "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Since this Court will not repudiate the State Court's construction and interpretation of Section 5 of the Michigan Use Tax Act, it would affirm upon review, even if certiorari were granted.

SUMMARY

We respectfully submit that the petition should be denied because:

(1) There is no jurisdiction in this Court.

(2) If this Court had jurisdiction, it could not pass upon a federal question in the case at bar; it would be bound by the State Court's interpretation of the State statute; and in the absence of amendment of that statute and further litigation between parties affected by the amendment, the issue of constitutionality would be moot.

Respectfully submitted,

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